IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

TRANS WORLD AIRLINES, INC.,
Appellant,

v.

THE NEW YORK STATE HUMAN RIGHTS APPEAL BOARD and THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Appellees.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the application of New York's Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81) ("HRL") to require a modification of Appellant's maternity leave policy for flight attendants—a policy maintained in compliance with federal safety requirements—encroaches upon a regulatory field occupied and preempted for exclusive federal control?

2. Whether the application of New York's HRL to require a modification of Appellant's maternity leave policy for flight attendants conflicts with Appellant's federal duty to conduct its operations with the highest possible degree of safety in violation of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2?

3. Whether the application of New York's HRL to require a modification of Appellant's maternity leave policy for flight attendants places an intolerable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3?

4. Whether Appellant has been denied due process of law in violation of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, by Appellees' refusal to decide this case on the basis of the evidence adduced at the hearing and Appellees' failure to consider, address or decide any of Appellant's federal constitutional claims?

PARTIES

The parties to this appeal are Trans World Airlines, Inc.,* as Appellant, and the New York State Human Rights Appeal Board and the New York State Division of Human Rights, as Appellees.

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* Pursuant to Sup. Ct. Rule 28.1, the following is a list of all parents, affiliates, and subsidiaries of Appellant Trans World Airlines, Inc.: Canteen Corporation, Century 21 Real Estate Corporation, Hilton International Co., Spartan Food System, Inc., and Trans World Corporation.

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JURISDICTIONAL STATEMENT

Appellant, Trans World Airlines, Inc., hereby appeals from an order of the Court of Appeals of the State of New York [1] dismissing its appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, affirming an order of the New York State Division of Human Rights, as affirmed by the New York State Human Rights Appeal Board, holding that Appellant's maternity leave policy for flight attendants violates section 296.1 of the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81), and requiring Appellant to substantially modify its policy.

OPINIONS BELOW

The orders of the Supreme Court of the State of New York, Appellate Division, First Department, the New York State Human Rights Appeal Board and the New York State Division of Human Rights are unpublished and appear respectively at pages A30-A31, A20-A21, and A13-A18 of the Appendix. The orders rendered by the Court of Appeals of the State of New York dismissing Appellant's appeal as of right from the order of the Appellate Division of the Supreme Court of the State of New York and denying Appellant's motion for reargument, or in the alternative for leave to appeal, are also unpublished and appear respectively at pages A33 and A46 of the Appendix.

JURISDICTION

These proceedings were commenced on December 14, 1973, with the filing of a complaint by the New York State Division of Human Rights (hereinafter the "Divi-

[1] TWA has been informed by the Court of Appeals that its order dismissing TWA's appeal as of right "upon the ground that no substantial constitutional question [was] directly involved," constituted a decision on the merits. Therefore, TWA believes that an appeal from the Court of Appeals is proper. *See Van Huffel v. Harkelrode*, 284 U.S. 225, 230 (1931). However, because there appears to be some uncertainty on the matter, TWA has filed a Notice of Appeal with both the Court of Appeals and the Supreme Court of the State of New York, Appellate Division, First Department.

sion"), as complainant, before the Division in its judicial capacity, against Trans World Airlines, Inc. (hereinafter "TWA"), alleging, *inter alia*,[2] that TWA's policy of requiring flight attendants to discontinue flying and begin a maternity leave of absence upon knowledge of pregnancy violates section 296.1 of the New York Human Rights Law, N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81) ("HRL").

TWA moved to dismiss the case on the grounds that the Division lacked jurisdiction or authority to grant the relief sought in its Complaint in that the application of New York's HRL to require a modification of TWA's maternity leave policy (1) encroached upon a regulatory field occupied and preempted for exclusive federal control, (2) conflicted with TWA's federal duty to conduct its operations with the highest possible degree of safety in violation of the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, and (3) placed an intolerable burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Const. art. I, § 8, cl. 3.[3]

The instant appeal is taken from an order of the Court of Appeals of the State of New York dismissing TWA's appeal from an order of the Supreme Court of the State of New York, Appellate Division, First Department, affiming an order of the New York State Division of Human Rights, as affirmed by the New York State Human Rights Appeal Board, holding that TWA's maternity leave policy for flight attendants violates New York's HRL and requiring TWA to substantially modify its policy.

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[2] *See* note 3 *infra* and accompanying text.

[3] TWA also maintained that inasmuch as its maternity leave policy was embodied in a collective bargaining agreement negotiated pursuant to federal law, the application of New York's HRL to require a modification of that policy was preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* Other issues, not involved in this appeal, were also made the subject of TWA's motion. *See* note 4 *infra.*

A Notice of Appeal was timely filed on May 18, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. art. VI, cl. 2:

> *Supreme Law of Land*
>
> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. I, § 8, cl. 3:

> *Regulation of Commerce*
>
> The Congress shall have power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. amend XIV, § 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, provides in pertinent part:

49 U.S.C. § 1302(a)(1), (2), (5) (Supp. IV. 1980):

> (a) In the exercise and performance of its powers and duties under this chapter, the [Civil Aeronautics] Board shall consider the following, among other

things, as being in the public interest, and in accordance with the public convenience and necessity:

(1) The assignment and maintenance of safety as the highest priority in air commerce, and prior to the authorization of new air transportation services, full evaluation of the recommendations of the Secretary of Transportation on the safety implications of such new services and full evaluation of any report or recommendation submitted under section 1307 of this title.

(2) The prevention of any deterioration in established safety procedures, recognizing the clear intent, encouragement, and dedication of the Congress to the furtherance of the highest degree of safety in air transportation and air commerce, and the maintenance of the safety vigilance that has evolved within air transportation and air commerce and has come to be expected by the traveling and shipping public.

. . .

(5) The development and maintenance of a sound regulatory environment which is responsive to the needs of the public and in which decisions are reached promptly in order to facilitate adaption of the air transportation system to the present and future needs of the domestic and foreign commerce of the United States, the Postal Service, and the national defense.

49 U.S.C. § 1303(a) (1976):

In the exercise and performance of his powers and duties under this chapter the Secretary of Transportation shall consider the following, among other things, as being in the public interest:

(a) The regulation of air commerce in such manner as to best promote its development and safety and fulfill the requirements of national defense;

49 U.S.C. § 1348(a), (c) (1976):

(a) The Administrator is authorized and directed to develop plans for and formulate policy with respect to the use of the navigable airspace; and assign by rule, regulation, or order the use of the navigable

airspace under such terms, conditions, and limitations as he may deem necessary in order to insure the safety of aircraft and the efficient utilization of such airspace. He may modify or revoke such assignment when required in the public interest.

. . .

(c) The Administrator is further authorized and directed to prescribe air traffic rules and regulations governing the flight of aircraft, for the navigation, protection, and identification of aircraft, for the protection of persons and property on the ground, and for the efficient utilization of the navigable airspace, including rules as to safe altitudes of flight and rules for the prevention of collision between aircraft, between aircraft and land or water vehicles, and between aircraft and airborne objects.

49 U.S.C. § 1421(b):

(b) In prescribing standards, rules, and regulations, and in issuing certificates under this subchapter, the Administrator shall give full consideration to the duty resting upon air carriers to perform their services with the highest possible degree of safety in the public interest.

49 U.S.C. § 1424(a), (b):

(a) The Administrator is empowered to issue air carrier operating certificates and to establish minimum safety standards for the operation of the air carrier to whom any such certificate is issued.

(b) Any person desiring to operate as an air carrier may file with the Administrator an application for an air carrier operating certificate. If the Administrator finds, after investigation, that such person is properly and adequately equipped and able to conduct a safe operation in accordance with the requirements of this chapter and the rules, regulations, and standards prescribed thereunder, he shall issue an air carrier operating certificate to such person. Each air carrier operating certificate shall prescribe such terms, conditions, and limitations as are reasonably necessary to assure safety in air transportation, and shall specify the points to and from which, and

the Federal airways over which, such person is authorized to operate as an air carrier under an air carrier operating certificate.

N.Y. Exec. Law § 296.1 (McKinney 1972 & Supp. 1980-81):

1. It shall be an unlawful discriminatory practice:

(a) for an employer . . . because of the age, race, creed, color, national origin, sex or disability, or marital status of any individual . . . to discriminate against any such individual in compensation or in terms, conditions or privileges of employment.

STATEMENT OF THE CASE

This case has taken a long road from its beginning to what TWA will show to have been a predetermined end. While only a full briefing and plenary consideration of the case can reveal completely the degree to which the New York state agencies and courts have refused to even consider TWA's evidence and authorities, an outline of the proceedings to date should give the Court some idea of the unfair treatment to which Appellant has been subjected.

This case began on December 14, 1973, with the filing of a Complaint by the Division as complainant, with the Division as judge, alleging discrimination by TWA against its female employees (A1-A3). The Complaint was so vague and indefinite as to be essentially meaningless and TWA answered by filing a general denial. The Division took no action with respect to the case until a hearing was scheduled over three years later on March 30, 1977. Prior to the hearing, TWA determined, through discussions with the Division's counsel, that two of its policies were under attack:

(1) the non-payment of sick leave and disability benefits to female employees absent from work due to normal pregnancy;[4] and

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[4] The benefits issue is no longer a part of this case. By the time the Division ordered TWA to begin paying income maintenance benefits to employees absent from work due to normal pregnancy,

(2) the requirement that female flight attendants take an immediate leave of absence from flight duties upon knowledge of pregnancy.

Prior to the hearing, TWA timely filed an Amended Answer raising numerous defenses, including claims that the Division lacked jurisdiction to enforce New York's HRL in such a way as to alter TWA's maternity leave policy for flight attendants on three constitutional grounds. First, the Division's regulation of policy maintained by TWA solely for flight safety reasons encroached upon a regulatory field preempted and occupied for exclusive federal control. Second, the Division's construction of New York's HRL as requiring an abandonment of TWA's maternity leave policy conflicted with TWA's safety obligations under the Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.* Third, the Division's construction of New York's HRL as requiring a modification of TWA's maternity leave policy placed an unconstitutional burden on interstate commerce (A4-A7).

At the opening of the hearing on March 30, 1977, TWA moved to dismiss the Complaint on the grounds mentioned above and filed a detailed memorandum in support of its motion. Consideration of the motion was deferred.[5]

TWA was already paying such benefits in compliance with the Pregnancy Disability Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) 1976). Because no back pay ordered the issue became moot for purposes of this case.

TWA continues to have an ongoing dispute with the Division concerning the time period prior to the effective date of the Pregnancy Disability Act. The Division is currently subject to an injunction issued by the United States District Court for the Southern District of New York barring it from attempting to require TWA and various co-plaintiffs to pay back pay for maternity benefits prior to the effective date of the Pregnancy Disability Act. *Delta Air Lines, Inc. v. Kramarsky*, 485 F. Supp. 300 (S.D.N.Y. 1980), *aff'd in part and rev'd in part on reh'g*, 666 F.2d 21 (2d Cir. 1981) *prob. juris. noted*, 102 S.Ct. 1968 (1982), *argued sub nom. Shaw v. Delta Air Lines, Inc.*, Jan. 10, 1983.

[5] Under the rules of the New York State Division of Human Rights, motions to dismiss are not heard until after the conclusion of the public hearing. Rules of Practice of the New York State Di-

The Division then presented its case, which consisted exclusively of the following three items:

(1) A copy of a 1973 contract between TWA and the union representing its flight attendants which embodied the two policies being challenged;

(2) A request that the hearing examiner take official notice of the record and decision in the case of *Rosenfeld v. United Air Lines, Inc.*, No. CS-32898-74, *decided* Sept. 10, 1975, *aff'd* App. Nos. 3558 and 3065, *confirmed sub. nom. United Air Lines, Inc. v. State Human Rights Appeal Board*, 61 A.D.2d 1010, 402 N.Y.S.2d 630 (1978), *appeal denied*, 44 N.Y.2d 648 (1978), *cert. denied*, 439 U.S. 982 (1978), in which the Division had ordered United Airlines to modify a similar maternity leave policy for flight attendants; and

(3) a transcript of the testimony of Dr. Andre Hellegers given in *Rosenfeld* on January 16, 1975.

The *Rosenfeld* case involved a claim of sex discrimination against United Airlines based on its rule requiring flight attendants to discontinue flight duties immediately upon knowledge of pregnancy. United's rule, like TWA's, applied only to flight personnel. Nonflight employees who became pregnant were allowed to work up to the point of delivery if they remained capable of performing their duties. Following a hearing before the Division, United was ordered to institute a new policy which, from the first through the twentieth (20th) week of a forty-week pregnancy prohibited United from disqualifying any female flight attendant from flight duties because of her pregnancy, leaving that decision entirely to the flight attendant and her personal physician. From the twentieth (20th) through the twenty-seventh (27th) week of pregnancy, flight attendants could be disqualified from flight duties for safety reasons on an individual basis. From

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vision of Human Rights § 465.10(e)(2), (3). No response was ever filed by the Division as complainant to TWA's motion and the portion of the motion addressed to the maternity leave issue was never discussed or considered by the Division in its judicial capacity.

the beginning of the twenty-eighth (28th) week through the completion of pregnancy, the Division ruled that safety considerations unique to the flight attendant position allowed United to impose a blanket rule requiring all pregnant flight attendants to cease flight duties.

The result in the *Rosenfeld* case was based exclusively on the testimony of Dr. Andre Hellegers. Dr. Hellegers was of the opinion that the condition of pregnancy would not significantly interfere with most flight attendants' performance of their duties. The Division accorded conclusive weight to Dr. Hellegers' opinion, despite his own admission that he was only "weakly" familiar with the duties of a flight attendant and had never been involved in or observed a real or simulated emergency evacuation of an aircraft. In this case, after introducing Dr. Hellegers' testimony from *Rosenfeld*, the Division rested.

For a period of nearly two years, TWA put on its case on the merits one or two days at a time. A great deal of TWA's evidence was uncontroverted[6] and showed that TWA maintains its mandatory maternity leave rule for flight attendants for one reason—because it has determined, based on sound medical advice, that there is a significant risk that a pregnant flight attendant may become incapacitated during flight due to unpredictable complications associated with the condition of pregnancy and be unable to perform her emergency duties. Based on this determination, and in recognition of its federal duty to operate with the highest possible degree of safety, TWA has decided that the safest policy for the protection of its passengers is to eliminate the risk of these unpredictable events by requiring pregnant flight attendants to cease flying at the first identifiable moment in pregnancy.[7]

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[6] In fact, the Division offered no rebuttal evidence of any kind.

[7] This point is important. The evidence adduced below was unquestioned and unrebutted that TWA's maternity leave policy for flight attendants is maintained solely for safety reasons. The Division did not argue and made no attempt to prove that these safety reasons are pretextual.

TWA presented six medical experts who testified in support of the reasonableness of its belief that the condition of pregnancy involves significant safety risks of an unpredictable nature. These witnesses were preeminent experts in the fields of obstetrics and gynecology, aerospace medicine, and fetal and maternal physiology and hematology. Unlike Dr. Hellegers, all of TWA's expert witnesses either had a working knowledge of the routine and emergency duties of flight attendants, or took it upon themselves to acquire this knowledge before giving their expert opinions. All testified that they considered TWA's policy to be reasonable, advisable, and the safest way to deal with flight attendant pregnancies.

On May 23, 1979, the hearing examiner issued his Recommended Findings of Fact, Decision and Order (A8-A12).[8] His "findings of fact" consisted of a single paragraph summarizing TWA's policies and failed to discuss any of the safety and medical testimony presented in the case. This total failure to discuss the evidence was explained quite succinctly in the section of the recommendation entitled "Opinion" in which the hearing examiner stated: "[t]he issues presented in this proceeding were considered and disposed of in *Rosenfeld v. United Airlines, Inc.*" (A10). Without discussing any of TWA's legal arguments concerning the mandatory maternity leave issue, the hearing examiner recommended that TWA be ordered to abandon its safety policy for pregnant flight attendants and adopt the policy ordered in the *Rosenfeld* case.

On June 27, 1979, the Commissioner of the New York State Division of Human Rights issued an order, which with minor exceptions, simply restated the "findings" of the hearing examiner (A13-A18). Like the hearing examiner, the Commissioner failed to discuss any of TWA's

[8] At the close of the evidence, the hearing examiner ordered the parties to file simultaneous post-hearing memoranda addressing the evidence and legal issues. Although TWA timely filed its memorandum, the Division, despite repeated extensions, never filed a memorandum.

evidence regarding the safety issue and based his decision solely on the testimony of Dr. Hellegers in the *Rosenfeld* case (A15). In addition, the Commissioner refused to consider TWA's motion to dismiss or rule on any of the constitutional issues raised therein.

On June 12, 1979, TWA appealed the Commissioner's order to the New York State Human Rights Appeal Board. In addition to the constitutional defenses raised before the Division, TWA maintained that it had not received its "day in court," that the Commissioner's order was predetermined, and that the entire proceeding before the Division was mere window dressing to disguise the Division's preconceived intent to parrot the result in *Rosenfeld*. Following oral argument, at which the Division failed to appear, the Appeal Board issued a form order affirming the Commissioner's order "in all respects." This order also failed to discuss any of the facts or legal issues in the case (A20-A21).

On April 13, 1981, TWA filed a timely appeal to the Supreme Court of the State of New York, Appellate Division, First Department. In its appeal TWA raised all issues raised below, including its constitutional challenges to the Division's jurisdiction and the Division's failure to comply with the fundamentals of due process. After full briefing, the Appellate Division issued a one-page order dated October 7, 1982, confirming the order of the Human Rights Appeal Board (A30-A31). The Appellate Division's order was rendered without opinion and contained absolutely no discussion of the evidence or legal issues.

On November 5, 1982, TWA appealed as of right to the Court of Appeals of the State of New York. The Court of Appeals dismissed the appeal, without opinion, on the ground that no substantial constitutional question was directly involved (A38). TWA's motion for reargument, or in the alternative for leave to take a discretionary appeal, was also denied, without opinion, on February 23, 1983 (A46).

TWA then timely filed this appeal.

SUBSTANTIALITY OF THE QUESTIONS PRESENTED

TWA is an interstate and international air carrier operating in the State of New York. The essence of its business is the safe transport of passengers in interstate and foreign commerce. *Diaz v. Pan American World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1972). As an air carrier entrusted with the lives and well-being of its passengers, TWA has a recognized federal statutory duty to conduct its operations "with the highest possible degree of safety." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. § 1424 (1976). This duty includes the obligation to employ at all times the most highly qualified persons in positions affecting the safety of its passengers. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413, 435 (N.D. Cal. 1977), *aff'd*, 649 F.2d 670 (9th Cir. 1980).

Every airline, court and administrative agency, including the Division, that has considered the alleged discriminatory impact of mandatory maternity leave policies for flight attendants has determined that at some point in pregnancy safety considerations require all pregnant attendants to discontinue flight duties. While there are disagreements as to when this point is reached, all agree that at some point a line must be drawn. In this case, the Division as prosecutor urged, and the Division as judge agreed, that the line should be drawn after the twenty-seventh (27th) week of pregnancy. From that point through the termination of pregnancy, the Division agreed that safety considerations justified a blanket rule prohibiting all pregnant flight attendants from continuing to fly (A15).

Courts which have considered sex discrimination challenges to maternity leave policies for flight attendants under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), have reached differing results.[9] In ev-

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[9] Compare *Harris v. Pan American World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980); *Levin v. Delta Air Lines, Inc.*, 29 Empl. Prac. Dec. (CCH) ¶ 32,905 (S.D. Tex. 1982); ***Air Line Pilots Association***

ery case, however, including the instant one, it has been acknowledged that any discriminatory impact on female flight attendants caused by a blanket mandatory maternity leave policy is justified *at some point in pregnancy* because of the federal requirement that interstate air carriers conduct their operations with the highest possible degree of safety.

It has been TWA's position throughout the course of these proceedings that a safety rule such as its maternity leave policy for flight attendants cannot be altered by a state law, such as New York's HRL, and that it may be altered, if at all, only on a nationwide basis pursuant to federal law. TWA has consistently maintained that the relief sought and ultimately granted by the Division in this case involved a construction and application of New York's HRL which is impermissible on at least three constitutional grounds.

As demonstrated more fully below, each of these challenges to the Division's jurisdiction presents substantial federal questions involving the construction and operation of the Supremacy Clause and Commerce Clause of the United States Constitution. In addition, the refusal of the New York state agencies and courts to consider, address or decide any of these issues or to reach a decision on the merits based on the evidence presented, operated to deny TWA a full, fair and impartial hearing in violation

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v. Western Air Lines, Inc., 23 Fair Empl. Prac. Cas. (BNA) 1042 (N.D. Cal. 1979); *Condit v. United Air Lines, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976), *aff'd*, 558 F.2d 1176 (4th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978) (upholding rule requiring maternity leave immediately upon knowledge of pregnancy as justified by the federal requirement that airlines conduct their operations with the highest possible degree of safety) with *Burwell v. Eastern Air Lines, Inc.*, 633 F.2d 361 (4th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981) (upholding blanket rule requiring a forced leave after the thirteenth (13th) week of pregnancy); *In re National Airlines, Inc.*, 434 F. Supp. 249 (S.D. Fla. 1977) (20-week rule); *Maclennan v. American Airlines, Inc.*, 440 F. Supp. 466 (E.D. Va. 1977) (26-week rule).

of the Due Process Clause of the Fourteenth Amendment. Under these circumstances, it is imperative that this Court note probable jurisdiction and decide the substantial constitutional issues ignored below.

A. Federal Regulation of the Field of Airline Safety Preempts New York's HRL Insofar As It Purports to Require a Modification of TWA's Maternity Leave Policy for Flight Attendants.

Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, state action in a particular regulatory field is absolutely precluded if Congress has manifested an intent to preempt or occupy that field for exclusive federal control. *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633 (1973); *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). Preemption may either be express or implied and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. at 525. Absent explicit preemptive language, a Congressional intent to supercede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *accord Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. at 633-39; *Campbell v. Hussey*, 368 U.S. 297 (1961).

Each of these tests is more than satisfied with respect to the field of air safety. The dominance of the federal interest in the field is exemplified by section 1108(a) of the Federal Aviation Act of 1958, as amended, 49 U.S.C.

§ 1508(a) (1976), which declares that the United States possesses "complete and exclusive national sovereignty in the airspace of the United States." *See also Burbank v. Lockheed Air Terminals, Inc.*, 411 U.S. at 638-39; *World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d 800, 803 (9th Cir. 1978). By its nature, air safety demands exclusive federal regulation in order to achieve national uniformity vital to the public interest. *See Burbank v. Lockheed Air Terminal*, 411 U.S. at 633; *see also Cooley v. Board of Wardens*, 53 U.S. 299 (1851).

Affirmance of the Division's order, however, would disrupt this uniformity, allowing states to broadly regulate air safety policies of interstate carriers under the rubric of state antidiscrimination laws or other aspects of the police power. In formulating safety policies and procedures, interstate airlines, such as TWA, would be subject to all of the requirements of New York law, and subject to further and possibly conflicting requirements imposed by the laws of other states. If New York and other states are allowed to regulate, directly or indirectly, the flight safety policies of interstate air carriers, the paramount federal interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate carriers could never be realized.[10] *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981); *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

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[10] It is of no moment that New York intrudes indirectly, through an antidiscrimination law, rather than directly, through a statute entitled "air safety regulation." Regardless of the mode adopted, to allow a state to regulate in an area reserved for exclusive federal control would frustrate the vital federal interest in uniformity. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 524-25 (1981); *San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon*, 359 U.S. 236, 244 (1959).

The comprehensive and pervasive nature of the federal regulatory scheme also makes it clear that Congress intended to occupy the field of airline safety to the exclusion of state action. The Federal Aviation Act of 1958, as amended, 49 U.S.C. § 1301 *et seq.*, and regulations promulgated thereunder, reflect a comprehensive plan for the regulation of interstate air transportation. Section 307 of the Act grants to the Federal Aviation Administration ("FAA") broad authority to regulate the use of navigable airspace "to insure the safety of aircraft and the efficient utilization of such airspace" and "for the protection of persons and property on the ground." 49 U.S.C. § 1348(a), (c) (1976). Section 601 of the Act charges the FAA with formulating safety standards and directs it to give full consideration to the duty resting upon air carriers to perform their services "with the highest possible degree of safety in the public interest." 49 U.S.C. § 1421(b) (1976); *see also* 49 U.S.C. §§ 1302(a)(1), (2), 1303(a), 1348(a), (c), 1424 (a), (b) (1976).

With respect to flight attendant performance, the FAA has pervasively exercised its regulatory authority. Although the FAA has not thus far required certification of the competency of flight attendants or expressly prescribed standards for pregnant flight attendants, its concern for flight attendant performance in emergency situations is manifested in numerous regulations. For example, the FAA requires commercial aircraft to carry a minimum number of well-trained and experienced flight attendants. 14 C.F.R. §§ 121.391, 121.433 (1982).[11] FAA

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[11] Flight attendant training programs must include, *inter alia*: (1) instruction in the operation of emergency equipment, including ditching and emergency evacuation equipment, 14 C.F.R. § 121.417(b)(2) (1982); (2) instruction in handling emergency situations, including decompression, fire, ditching and evacuation, hijacking and other unusual situations; and (3) the performance of emergency drills, including ditching, emergency evacuation, fire and smoke control, operation of emergency exits, use of evacuation

regulations also require air carriers: (1) to locate flight attendants near exits and distribute them in the aircraft in order to provide the most effective egress of passengers in the event of an emergency evacuation, 14 C.F.R. § 121.391(d) (1982); (2) to assign emergency functions to each attendant, 14 C.F.R. § 121.397 (1982); and (3) to conduct initial, transition, and recurrent training of flight attendants using FAA approved courses, including drill training in emergency evacuations and other emergency events.[12] 14 C.F.R. §§ 121.401, 121.415(a)(3), 121.417, 121.421, 121.427 (1982). In the course of training, flight attendants must be given "a comprehensive check to determine ability to perform assigned duties and responsibilities." 14 C.F.R. §§ 121.421(b), 121.422(b), 121.427(b)(3) (1982).

In view of the pervasive nature of the federal regulatory scheme, courts have not hesitated to find *total* federal preemption of the field of airline safety. For example, in *Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, which involved a city's attempt to regulate aircraft noise, the Court quoted from the following passage in Justice Jackson's concurring opinion in *Northwest Airlines, Inc. v. Minnesota*, 322 U.S. 292 (1944):

> Congress has recognized the national responsibility for regulating air commerce. *Federal control is intensive and exclusive.* Planes do not wander about in

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chutes, and operation of life rafts, lines and vests. 14 C.F.R. § 121.417(c) (1982).

[12] The airline must show by actual demonstration that its flight attendants are able to conduct such an evacuation within ninety (90) seconds. 14 C.F.R. § 121.291 (1982). To satisfy the demonstration requirement, the aircraft must be loaded to capacity with passengers, including a minimum number of women, children and elderly persons. 14 C.F.R. § 121.291 (App. D(a)(7)). The crew must then demonstrate the ability to evacuate all persons from the plane in darkness, without normal electrical power, with baggage blocking the aisles and accessways, and with only half of the emergency exits functioning. 14 C.F.R. §§ 121.291 (App. D(a)(4), (10), (13), (17)) (1982).

> the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands.

322 U.S. at 303 (emphasis added). The majority in *Burbank* went on to state:

> The Federal Aviation Act requires a delicate balancing between safety and efficiency, 49 U.S.C. § 1348(a), and the protection of persons on the ground. 49 U.S.C. § 1348(c). Any regulations adopted by the Administrator to control noise pollution must be consistent with the "highest possible degree of safety." 49 U.S.C. § 1431(d)(3). *The interdependence of these factors require a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.*

411 U.S. at 638-39 (emphasis added). The dissent, moreover, agreed that Congress had preempted the field of air safety: "[t]he paramount substantive concerns of Congress were to regulate federally *all aspects* of air safety. . . . " *Id.* at 644 (Rehnquist, J.) (emphasis added); *see also World Airways, Inc. v. International Brotherhood of Teamsters, Airline Division*, 578 F.2d at 803 ("Federal law has prempted the area of aviation"); *accord United States v. Christenson*, 419 F.2d 1401, 1403-04 (9th Cir. 1969).

Even the State of New York has recognized federal superintendenace in the field of air safety. For example, in *Manfredonia v. American Airlines, Inc.*, 68 A.D.2d 131, 416 N.Y.S.2d 286 (1979), the New York Supreme Court noted that:

> Federal law *exclusively* governs the operation, control, and *safety of air carriers* . . . . Preemption by Congress of a field of regulation implies an inherent need for nationwide uniformity and Federal primacy . . . particularly in the field of air commerce.

Id. at 290 (emphasis added); *see also American Airlines, Inc. v. Town of Hempstead*, 272 F. Supp. 226, 232

(E.D.N.Y. 1967), *aff'd*, 398 F.2d 369 (2d Cir. 1968), *cert. denied*, 393 U.S. 1017 (1969) ("It would be difficult to visualize a more comprehensive scheme of combined regulation, subsidization and operational participation than that which the Congress has provided in the field of aviation").[13]

In summary, the dominance of the federal interest, the potential for conflicting state regulations, and the pervasiveness of the federal regulatory scheme make it clear that Congress has totally preempted and occupied the field of airline safety. New York's attempted regulation of TWA's maternity leave policy for flight attendants clearly encroaches upon this regulatory field and presents a substantial federal question for decision by this Court.

B. The Application of New York's HRL To Require a Modification of TWA's Maternity Leave Policy for Flight Attendants Conflicts with TWA's Federal Duty To Conduct Its Operations with the Highest Possible Degree of Safety.

Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law. *Fidelity Federal Savings & Loan Association v. Cuesta*, 102 S.Ct. 3014 (1982). Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963), or when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Jones v. Rath Pack-*

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[13] Recent decisions of this Court involving attempted state regulation of interstate carriers also strongly support a finding of preemption in the present case. *See e.g., Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

ing Co., 430 U.S. at 526; *Bethlehem Steel Co. v. New York Labor Relations Board*, 330 U.S. 767, 773 (1947).

In determining whether both federal and state regulations may operate, or the state regulation must give way, it is immaterial whether the regulations are aimed at similar or different objectives. If a conflict exists, the state regulation must yield. *Perez v. Campbell*, 402 U.S. 637, 651 (1971); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. at 142.

As noted above, section 601(b) of the Federal Aviation Act requires interstate air carriers, such as TWA, to conduct their operations "with the highest possible degree of safety." 49 U.S.C. § 1421(b) (1976); *see also*, 49 U.S.C. § 1424 (1976). This duty includes the obligation to employ at all times the most highly qualified persons in positions affecting the safety of its passengers. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. at 435.

It is undisputed that flight attendants are in the first instance safety personnel, who must be physically and mentally capable of performing their emergency duties at all times. FAA regulations require flight attendants to serve on board commercial aircraft for the primary purpose of assisting passengers in the event of an emergency and prescribe comprehensive performance standards. 14 C.F.R. § 121.391, 121.397 (1982). The reason for the FAA's detailed regulations concerning the emergency duties of flight attendants is elementary—passenger injuries and deaths will be less likely if well-trained and physically able flight attendants are available in the event of an emergency.[14]

TWA has determined, based on sound medical evidence, that the safety of its passengers and employees would be seriously jeopardized by allowing flight attendants to con-

[14] The record in this case is replete with evidence showing how the availability of well-trained and able flight attendants has made the ultimate difference in the saving of passenger lives during aircraft accidents.

tinue flying while pregnant.[15] This determination is based primarily on two facts, both of which are firmly established by the record below.[16] First, there is a medically documented and substantial risk that a pregnant flight attendant may become incapacitated during flight as a result of fainting, extreme fatigue, nausea, vomiting, or spontaneous abortion, and be incapable of performing her emergency duties.[17] Second, the evidence of record unequivocally shows that it is impossible to predict on the basis of individual examinations which women will

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[15] In addition to pregnancy, TWA has identified other physical conditions that could interfere with a flight attendant's performance of his or her emergency duties and has determined that any flight attendant who has one of these conditions should not be allowed to fly. These conditions include: insulin dependant diabetes, potentially disabling heart conditions, epilepsy, mental instability, and drug or alcohol abuse problems.

[16] TWA respectfully submits that even if a controversy did exist among medical experts as to whether pregnant flight attendants should be permitted to continue on flight duty, the very existence of such a controversy would require a conservative decision by management. As a result of the standards and rules prescribed for commercial air carriers by the FAA, TWA is required to adopt a conservative stance regarding fitness standards for flight personnel. *Harriss v. Pan American World Airways, Inc.*, 437 F. Supp. 413 (N.D. Cal. 1977), *aff'd* 649 F.2d 670 (9th Cir. 1980); *Condit v. United Air Lines, Inc.*, 13 Fair Empl. Prac. Cas. (BNA) 689 (E.D. Va. 1976); *cf. Hodgson v. Greyhound, Inc.*, 499 F.2d 859 (7th Cir.), *cert. denied*, 419 U.S. 1122 (1974); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

[17] The Division's findings to the contrary are devoid of *any* support in the record. All evidence presented at the hearing, including the testimony of Dr. Andre Hellegers upon which the Division exclusively relied, acknowledged that: (1) pregnant women suffer nausea and vomiting more frequently than non-pregnant women and that ninety percent (90%) of all pregnant women experience nausea and/or vomiting during the first trimester of pregnancy; (2) pregnant women faint more frequently than non-pregnant women; and (3) between ten and twenty percent of all pregnancies terminate in spontaneous abortions during the first trimester.

experience any one or more of these potentially disabling occurrences at any time during pregnancy.[18]

In response to these facts, and in compliance with its federal safety obligations, TWA has adopted what is undeniably the safest policy for the protection of its passengers by requiring pregnant flight attendants to cease flying immediately upon becoming aware of the condition of pregnancy. The State of New York, however, has ordered TWA to abandon this policy and to substitute a policy which New York deems to be "safe enough." As an interstate air carrier with a federal duty to conduct its operations with the "highest possible degree of safety," TWA respectfully submits that "safe" is *not* enough; rather, its federal obligations require TWA to adopt the "safest" policy in dealing with the admitted risks associated with flight attendant pregnancies. *See Murnane v. American Airlines, Inc.*, 667 F.2d 98, 101 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 915 (1982).[19]

Although the Division attempted to minimize the safety risks associated with the condition of pregnancy, its arguments simply miss the point. As an interstate air carrier with a public duty to operate with the highest possible

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[18] All of the medical experts who testified on the point agreed that it is impossible to predict through individual examination which women will experience a potentially disabling complication at any given time during pregnancy.

[19] In *Murnane* the importance of safety in the operation of interstate airlines was emphasized as follows:

> [T]he airline industry is one in which safety is of the utmost importance. . . . Therefore, . . . the airline industry must be accorded great leeway and discretion in determining the manner in which it may be operated *most safely* (citations omitted). This is in accord with American's view that "safe" is not sufficient. Rather, the "safest" possible air transportation is the ultimate goal. Courts . . . do not possess the expertise with which, in a cause presenting safety as the critical element, to supplant their judgments for those of the employer.
>
> 667 F.2d 101.

degree of safety, TWA is in the business of avoiding and managing risks resulting from low probability occurrences which could have extremely serious consequences. Indeed, such risk management is of the essence of TWA's business, since aircraft accidents and incidents are invariably unique and low probability occurrences. Simply stated, by failing to deal with a known risk-causing factor, such as pregnancy, TWA would be breaching its federal duty to operate "with the highest possible degree of safety."

In summary, New York's construction of the HRL to require an abandonment of TWA's maternity leave policy for flight attendants creates a direct substantive conflict between state and federal law. TWA cannot comply with its federal duty to conduct its operations "with the highest possible degree of safety" if it is prohibited by the State of New York from following a policy that minimizes the medically documented risk that a pregnant flight attendant may become incapacitated during flight and be incapable of performing her emergency duties. Where, as here, compliance with both federal and state regulations is impossible, the state regulation must fall. *Jones v. Rath Packing Co.*, 430 U.S. at 526; *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. at 142-43.

C. The Application of New York's HRL to Require a Modification of TWA's Maternity Leave Policy for Flight Attendants Places an Unconstitutional Burden on Interstate Commerce.

The Commerce Clause of the United States Constitution, U.S. Const. art. 1, § 8, cl. 3, affirmatively grants to Congress the plenary power to regulate commerce among the several states and, correlatively, limits the scope of permissible regulation by the states. *Cooley v. Board of Wardens*, 53 U.S. 299 (1851). Attempted state regulation of various aspects of interstate commerce may run afoul of the Commerce Clause not only in situations in

which there is an *actual* inconsistency between state and federal requirements, *cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), but also in situations in which commerce is burdened by a *potential* for inconsistent state regulations. *Edgar v. Mite Corp.*, 102 S.Ct. 2629 (1982); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); *Morgan v. Virginia*, 328 U.S. 373 (1946); *Hall v. De Cuir*, 95 U.S. 485 (1878). In this case, the Division's construction and application of New York's HRL to require a modification of TWA's maternity leave policy for flight attendants places an intolerable burden on interstate commerce by creating a potential for conflicting and inconsistent state regulations.

As previously discussed, the potential for conflicting state regulations concerning the maternity leave policies of interstate air carriers is substantial. If the state of New York is allowed to regulate TWA's flight safety policies pursuant to its police powers, it follows that other states could do so as well. Thus, while New York might require TWA to permit flight attendants to continue flying through the twenty-seventh (27th) week of pregnancy, there would be nothing to prevent the State of Michigan from requiring a policy that allowed flight attendants to fly through the thirtieth (30th) week of pregnancy, the State of Pennsylvania from determining that flight attendants should only be allowed to fly through the fifteenth (15th) week, and the State of California from requiring a policy that prohibits flight attendants from flying at all during pregnancy. Under these circumstances, it would be impossible for TWA to comply with the requirements of each state in a direct flight from New York to Los Angeles with intermediate stops in Philadelphia and Detroit. Such a potential for inconsistent state regulation plainly demonstrates that this issue is inappropriate for state action.

While it is true that in evaluating a Commerce Clause challenge to state regulation, courts must balance the

state interest against the federal interest, *Raymond Motor Transportation, Inc. v. Rice*, 434 U.S. 429 (1978), the application of this balancing approach to the present case merely confirms that New York's attempted regulation of TWA's safety policies violates the Commerce Clause. The federal interest in this area is twofold. First, there is a strong national interest in facilitating unencumbered interstate travel by maintaining uniform regulation of interstate carriers. *See Kassel v. Consolidated Freightways Corp. of Delaware*, 450 U.S. 662 (1981). Second, and more importantly, there is a vital federal interest in providing for the highest possible degree of safety in air travel. *See* 49 U.S.C. §§ 1302(a)(1), (2), 1421(b)(1); *see also Murnane v. American Airlines, Inc.*, 667 F.2d 98 (D.C. Cir. 1981).

The state interest, on the other hand, is in eliminating what New York perceives to be sex discrimination. Although TWA vigorously contests the claim that its maternity policy constitutes sex discrimination at all, any adverse effects that its policy may have on female flight attendants are extremely minimal in any case. Indeed, the only considerations that allegedly weigh in favor of forcing TWA to abandon its policy are monetary ones relating to the period of maternity leave itself—considerations which have largely disappeared since flight attendants now receive income maintenance benefits while on maternity leave.[20]

Balancing this rather minor state interest against the important federal interests of ensuring uniformity and the public safety leads inevitably to the conclusion that the latter outweigh the former. Indeed, in balancing safety interests against the *federal* interest in eliminating discrimination, federal courts have consistently reached the conclusion that safety considerations must

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[20] *See* Pregnancy Disability Act of 1978, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).

prevail. *See e.g., Air Lines Pilots Association, International v. Quesada*, 182 F.Supp. 595, 596 (S.D.N.Y. 1960), *aff'd*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961) (noting that "[a]ny attempt to weigh the countervailing considerations of dollar loss . . . against the public safety in air carrier operations borders on vulgarity"); *Murnane v. American Airlines, Inc.*, 482 F.Supp. at 147 ("individual interests in being free of employment discrimination on account of age must give way to the societal interest in having the safest air transportation system possible"); *cf. Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977). In the instant case, it is inconceivable that in evaluating the competing interests a court could place a higher value on the minor monetary interests asserted by the State of New York on behalf of pregnant flight attendants than on the safety of the traveling public.

Thus far the Division's only response to TWA's claims under the Commerce Clause has been a citation to the case of *Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963).[21] In *Continental*, the black plaintiff complained to the Colorado Anti-Discrimination Commission that Continental Air Lines, an interstate air carrier, had refused to hire him because of his race. The Court determined that the case presented the issue of whether the Colorado Anti-Discrimination Act of 1957 could legally be applied to regulate the hiring practices of an interstate air carrier. In deciding that the state statute could be so applied, the Court relied on the fact that there was virtually no chance that an interstate carrier would find itself subject to conflicting state statutes on the issue of racial discrimination. Whereas Colorado had forbidden racial discrimination in hiring, no other state could *require* such discrimination and therefore place an interstate carrier

[21] In fact, citations to the *Continental* case have comprised the Division's only response to *any* of TWA's constitutional arguments throughout the entirety of this case.

in the situation of being unable to comply simultaneously with all applicable state laws.[22]

In this case, unlike *Continental*, there is a real and substantial possibility that TWA could face conflicting state regulations with regard to the timing of maternity leaves for flight attendants. Thus, the burden that could not exist in *Continental* does exist here. Under these circumstances, the Division's attempted regulation of TWA's maternity leave policy is clearly prohibited by the Commerce Clause.

D. TWA Has Been Denied Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution By Appellees' Refusal To Decide this Case Based on the Evidence and Appellees' Failure To Consider, Address or Decide Any of TWA's Constitutional Claims.

It was TWA's position before the Division that New York law could not be interpreted or applied so as to require the abandonment or alteration of an airline safety policy maintained for the purpose of complying with its federal safety duty and, consequently, that the Division's Complaint should be dismissed.[23] TWA's alternative defense was that its policy did not violate New

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[22] The Court also considered the question whether the antidiscrimination provisions of certain federal statutes, including the Federal Aviation Act, preempted the field of antidiscrimination legislation as applied to interstate carriers. For similar reasons, the Court determined that federal law had not preempted the field of antidiscrimination legislation. However, that issue—preemption of the field of antidiscrimination regulation as opposed to airline safety regulation—is not involved in the present case.

[23] Arguably a state could allege and prove that a safety policy was in fact not a safety policy at all but a mere pretext for action prohibited by state law. In such a case it might be found that the state's action did not intrude on an area reserved for exclusive federal regulation. *See* Sections A, B & C above. But here, the Division neither alleged, proved nor found TWA's policy to be pretextual. Here a state agency, lacking any expertise in airline operations, merely substituted its judgment and safety policy for that of the airline.

York law in any event because it was not sex discriminatory but rather a reasonable business policy required by the nature of TWA's business and the known medical risks associated with the condition of pregnancy. On this latter point, and because the Division would not consider TWA's motion to dismiss until after the hearing, TWA presented three safety and six medical experts, all of whom explained and supported TWA's policy.

There is absolutely no indication in any of the decisions below that *any* of the evidence or legal arguments offered by TWA *were even considered*. In fact, the only conclusion that can fairly be drawn from the proceedings to date is that the result below was predetermined and that TWA was denied the fair hearing required by due process of law.

1. *TWA was denied due process of law by Appellees' failure to consider its federal defenses.*

At its first opportunity, TWA urged that the Division was prohibited by federal law from applying New York law in such a way as to require TWA to abandon one safety policy for flight attendants and substitute another in its place. In his recommended Findings of Fact, Decision and Order, the hearing examiner did not address or even mention TWA's numerous authorities. The Commissioner's order differed little from the one recommended by the hearing examiner and again totally ignored TWA's federal defenses.

The Division's total refusal to deal with federal defenses submitted by a party appearing before it is by no means unique to the present case. In *Burroughs Corporation v. Kramarsky*, No. 79-778 (W.D.N.Y. Nov. 14, 1979), *aff'd on reh'g*, 666 F.2d 26 (2d Cir. 1981), *prob. juris. noted*, 102 S.Ct. 1968 (1982), *argued sub nom. Shaw v. Delta Air Lines, Inc.*, Jan. 10, 1983,[24] the court addressed

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[24] The *Burroughs* case involved the same benefits issues originally involved in this case and is currently pending before this Court *sub nom. Shaw v. Delta Air Lines, Inc.* Case No. 81-1478. The district

a similar refusal by the Division to deal with federal defenses. In that case the court held that attempts to present federal defenses to the Division and "through the state adjudicative process would be futile." Judge Burke's observations on how the Division deals with employers who attempt to assert federal defenses is an accurate description of TWA's experience in this case:

> Defendant's processing of complaints filed by Burroughs' employees demonstrates the futility of Plaintiff's attempt to raise its federal issues within the State administrative proceedings. Plaintiff's attempts were met with prejudgment, bias, and repeated violations of its elemental due process right to be heard. Any attempt by Plaintiff to raise its federal constitutional issues was, and is likely to remain in the future, an exercise in futility.
>
> The Supreme Court has recognized that similar bias and prejudgment by an administrative body justifies the interposition of a Federal Court's injunctive and declaratory powers (citations omitted).
>
> Defendants' adjudicative procedures are so tainted that Plaintiff has not received, nor can it expect to receive, a fair hearing on its federal constitutional claim.

The Division gave TWA's federal defenses in this case exactly the same consideration it gave those of the plaintiff in *Burroughs*—none at all.

Before the Human Rights Appeal Board, before the Appellate Division of the New York Supreme Court, and before the Court of Appeals of the State of New York, TWA met with exactly the same response. Although TWA strenuously and at every opportunity urged and fully briefed its federal claims, its arguments were met with silence.

TWA does not assert that at every step of every case, from initial agency decision through ultimate disposition

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court's opinion appears at pages 107-117 of the Appendix to the Jurisdictional Statement in that case.

on appeal by the highest court of the state, every legal argument raised must be addressed and discussed in detail. However, TWA does assert that due process requires that at *some* point in the process *some* indication be made that *some* consideration has been given to *some* of the legal defenses asserted by the party which has been put on trial. TWA's constitutional arguments on the maternity leave question are substantial as this jurisdictional statement shows. These are the same arguments that were presented at every stage of the proceedings in the State of New York. Yet none of these defenses was ever mentioned in any of the several orders issued below. The only implication which can be drawn is that, as in the *Burroughs* case, TWA's defenses were simply ignored because of prejudgment. This is not the fair treatment required by the Due Process Clause of the Fourteenth Amendment. *Gibson v. Berryhill*, 411 U.S. 564; *In re Murchison*, 349 U.S. 133 (1955).

2. *TWA was denied due process of law by Appellees' failure to render a decision based on the evidence adduced at the hearing.*

There can be little doubt that the Division never intended to consider TWA's evidence on the maternity leave issue any more than its considered TWA's federal defenses. The Division apparently takes the position that the result in the *Rosenfeld* case constitutes some sort of *per se* rule for the airline industry. That result, based totally on the testimony of Dr. Hellegers, an individual who by his own admission was only "weakly" familiar with the duties of flight attendants, has become, in the Division's view, the *law* of the State of New York. While the notion that the New York State Division of Human Rights has the competence or expertise to promulgate a *per se* safety rule for the airline industry is ludicrous, the notion that the Division has the jurisdiction to do so is frightening; yet this is precisely what the Division thinks it did in *Rosenfeld*.

Neither in the recommended findings by the hearing examiner, nor in the actual findings of the Commissioner, was there even the briefest mention of the mass of evidence submitted by TWA in support of its policy. No mention was made of the safety standard applicable to TWA and all interstate air carriers, and no mention was made of the unique safety aspects of the flight attendant position. The reason for such a conspicuous omission was made perfectly clear in the Division's Reply Brief before the Appeal Board, where it stated:

> No facts were presented by TWA to distinguish TWA's policy from the policy in question in *Rosenfeld*. The *law* in New York is that an airline, absent medical proof of disability, may not unilaterally require a pregnant flight attendant to take an unpaid leave of absence . . . .

With such an attitude, allowing TWA to present its nationally and internationally known medical experts to offer their contrary opinions amounted to nothing more than a cruel hoax. The Division had no intention of listening to these experts and it in fact did not listen to them. Thus, the "hearing" which TWA received was a far cry from a "fair trial" before a "fair tribunal." *In re Murchison*, 349 U.S. 133 (1955).[25]

The treatment meted out to TWA by the Appellees presents substantial questions arising under the Due Process

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[25] The failure to make findings of fact alone renders the Division's actions infirm. Whether the evidence might have justified findings supporting the result in this case can never be known because there were simply no findings to support any result. As this Court stated in the seminal administrative law case of *Securities and Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 94 (1943):

> The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interest protected by the Act. There must be such a responsible finding. For the Courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review.

Clause of the Fourteenth Amendment. This Court is TWA's last resort not only in the sense that it is the highest court in the land, but also in the sense that an appeal to this Court is TWA's last chance to have the issues and evidence considered at all by a fair and impartial decision maker. A finding that this case does not present "substantial" federal questions would be the equivalent of granting a license to the Division to continue its high handed tactics.

CONCLUSION

It is respectfully submitted that the Constitutional issues presented in this appeal are both substantial and important, and that this Court should note probable jurisdiction and take this case under plenary consideration.

Respectfully submitted,

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